# Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can

NAMAN L. J. WOOD*

## I. INTRODUCTION

Court-connected mediation has become a common feature of courts throughout the United States. While litigation and mediation are separate and distinct processes, they are not necessarily mutually exclusive. Court-connected mediation operates within the context of ongoing litigation, and anything that takes place in the case before it is sent to mediation impacts the mediation process. For example, information derived from the discovery phase of litigation is used in mediation to clarify issues, evaluate risks, and formulate strategies for negotiations.[1]

Similarly, the filing of motions in a case before mediation also changes the dynamics of the mediation process. The parties move to a position of entitlement as to the issues raised in the motions, the intensity of the conflict between the parties escalates, bargaining positions harden, and negotiation strategies shift. How the court deals with these motions further has an impact on the mediation process and may influence the mediation outcome.

Some courts rule on the pending motions before engaging in mediation; others go ahead and send cases to mediation in the hopes of avoiding the motions. Although individual cases present their own reasons for taking one course of action or the other, mediation and economics literature both suggest that mediation settlement rates will be higher if courts routinely rule on pending motions before sending cases to mediation. This paper will review that literature to construct a theoretical basis for the hypothesis, and then put the hypothesis to an empirical test.

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*Shorter College, B.A., 1973; Stetson University College of Law, J.D. 1978; University of Nevada, Reno, M.J.S., 2010. This article is in partial fulfillment of the requirements for the Master of Judicial Studies degree at the University of Nevada, Reno. The author is grateful to Dr. John Dobra, Dr. Veronica Dahir, and Dr. Susan Raines for their insightful comments and to Victoria Springer for her assistance with the data analysis software.

[1] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 571 (6th ed. 2003).

## II. BACKGROUND

Mediation is an ancient dispute resolution process that has historically operated independently of the courts.[2] Its use as a tool of court administration is a fairly recent development, inspired by Roscoe Pound's blistering speech to the American Bar Association in 1906.[3]

Pound noted widespread public dissatisfaction with the administration of justice rooted in the persistent perception that courts are overloaded and inefficient.[4] He is certainly not the first to voice this concern; literature throughout history has graphically portrayed the injustice of slow justice. Shakespeare, Dickens, and even the Bible echo the theme that justice delayed is justice betrayed.[5] Pound went on to denounce archaic legal philosophies and practices that fritter away valuable court time, and called for a comprehensive reform of the American justice system.[6]

In 1976, a group of legal scholars, judges, and leaders of the bar, calling themselves the Pound Conference, met in the very room where Pound had spoken, to closely examine contemporary concerns about the efficiency and fairness of court systems, as well as to chart a course for improvement.[7] One of the initiatives coming out of the Pound Conference was the use of alternative dispute resolution (ADR) forums. [8]

The ADR movement got off to a slow start in part because many courts considered that they already had an effective "ADR" system in place. This

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[2] ALAN SCOTT RAU ET AL., MEDIATION AND OTHER NON-BINDING ADR PROCESSES 1–3 (3d ed. 2006).

[3] ROSCOE POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE (1906), *reprinted in* THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE 337 (A. Leo Levin & Russell R. Wheeler eds., 1979) [hereinafter Pound Conference].

[4] *See* HÉCTOR FIX-FIERRO, COURTS, JUSTICE AND EFFICIENCY 1–14 (2003).

[5] *See, e.g.*, *Luke* 18:1–8; CHARLES DICKENS, BLEAK HOUSE (1853); WILLIAM SHAKESPEARE, HAMLET, act 3, sc. 1.

[6] Pound Conference, *supra* note 3, at 343–351.

[7] *See* American Bar Association, *Report of Pound Conference Follow-Up Task Force*, 74 F.R.D. 159 (1976); William H. Erickson, *The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century*, 76 F.R.D. 277 (1978); Griffen D. Bell, *The Pound Conference Follow-Up: A Response from the United States Department of Justice*, 76 F.R.D. 320 (1978).

[8] Pound Conference, *supra* note 3. *See* Warren E. Burger, *Agenda for 2000 A.D.-A Need for Systematic Anticipation*, 70 F.R.D. 83 (1976), for the major addresses delivered at the conference. Special emphasis was placed on alternative, non-judicial means of dispute resolution. *Id.*; *see also*, Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

"ADR" system consisted of direct negotiations between the parties and resulted in more than 90% of all cases being settled before trial.[9] The problem with this system was that results were too slow and too expensive, and the process was too stressful. Cases usually settled when the cost of litigation accrued to the point that there was little to be gained from trial.[10] Needless to say, this system did nothing to alleviate the widespread public dissatisfaction with the courts. By 1986, mushrooming caseloads and a public outcry for change prompted courts across the country to initiate pilot ADR programs.[11] Since then, the ADR movement has picked up steam and drawn wide public attention. ADR mechanisms have been established throughout the United States with court-connected programs in both state and federal courts.[12]

Mediation is, by far, the most popular of the ADR techniques used in court programs today.[13] Court-connected mediation differs from other types of mediation in that it takes place under the auspices of the law.[14] A referral to mediation does not diminish the importance of the law, but rather gives the parties access to an alternative process that may save them time and money while remaining under the careful supervision of the court.[15]

## III. MEDIATION

Mediation is premised on the philosophy that any agreement voluntarily arrived at by the parties through a process of cooperation and compromise is a more productive resolution of their conflict than a judgment imposed by a court as the product of an adversarial process in which one party is declared the winner and the other the loser.[16] The parties will be better satisfied and more likely abide by an agreement of their own creation.[17] In mediation, the parties attempt to resolve their dispute collaboratively with the help of a

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[9] Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 670 (1986).

[10] *Id.*

[11] *Id.* at 669–70.

[12] *Id.* at 668.

[13] Douglas A. Henderson, *Mediation Success: An Empirical Analysis*, 11 OHIO ST. J. ON DISP. RESOL. 105, 128–32 (1996).

[14] Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L. Q. 47, 65 (1996).

[15] Edwards, *supra* note 9, at 673.

[16] RAU ET AL., *supra* note 2, at 11–12.

[17] *Id.* at 12.

neutral third party, referred to as "the mediator." [18] The mediator attempts to separate the people from the problem by helping the parties focus on their respective interests (as opposed to their legal rights), explore alternatives that satisfy their needs, and construct a consensual resolution of the issues.[19]

The mediator has no decisionmaking authority, but controls the process and acts as a facilitator of communications between the parties.[20] The mediator's role varies with the circumstances of the individual case and the goals to be accomplished.[21] The mediator often acts as an encourager, a generator of possible solutions, a reality tester, and a shuttle diplomat who obtains and distributes private information to help focus on areas of agreement without the risks of face-to-face confrontation by the parties.[22] The mediator helps the parties clarify the risks of litigation, explore probable trial outcomes, and define their best alternative to a negotiated settlement.[23]

The parties are empowered, by the very nature of the mediation process, to confront each other on both a moral and a personal level.[24] The parties are encouraged to focus on their real interests rather than contrived legal positions, view the conflict from various perspectives, and participate in the process in good faith.[25] The very act of participating in the mediation process alters the existing dynamics between the parties. By requiring the parties to hear each other's justifications and confront each other's feelings, mediation helps the less powerful party invoke shared community standards.[26] The ultimate objective is to bring the parties to a mutual acceptance of community standards of fairness and broad equity that might not be possible in an adversarial proceeding.[27] The strength of mediation is that it permits the parties to achieve their own dynamic resolution rather than being bound by a superimposed and inflexible legal solution.[28]

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[18] ROBERT J. NIEMAC ET AL., GUIDE TO JUDICIAL MANAGEMENT OF CASES IN ADR 128 (2001).

[19] ROGER FISHER ET AL., GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 21–29 (2d ed. 1991).

[20] RAU ET AL., *supra* note 2, at 14.

[21] *Id.* at 12.

[22] Jennifer Gerarda Brown & Ian Ayers, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 324–25 (1994).

[23] Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. LEGAL STUD. 1, 2–3 (1995).

[24] RAU ET AL., *supra* note 2, at 13.

[25] NIEMAC ET AL., *supra* note 18, at 63.

[26] RAU ET AL., *supra* note 2, at 12–13.

[27] *Id.* at 13.

[28] *Id.* at 12.

## IV. TRANSACTION COSTS AND THE COASE THEOREM

In order to reach this dynamic resolution, the parties must first overcome the barriers that caused negotiations to stall and litigation to be filed. In economics literature, these barriers are referred to as transaction costs.[29] Transaction costs include any and all impediments to bargaining.[30] Some transaction costs are directly financial in nature, such as the cost of preparing for negotiations, hiring representatives, and obtaining information.[31] Some are indirectly financial, such as the time spent in negotiations.[32] Other transaction costs are psychological in nature; for example: (1) anger; (2) emotional investment in the case; (3) risk-taking tendencies; (4) reluctance to share information, making it difficult for each side to determine the strength of the other side's case and to gauge a realistic range of settlement; (5) reluctance to suggest a settlement range for fear of looking weak; (6) positional bargaining in which each party refuses to move far from his best case scenario without a perceived reciprocal movement from the other side; (7) overly optimistic estimates of the probability of achieving the best case scenario; (8) incentive of attorneys and other agents to continue litigation; (9) nonproductive negotiation strategies; (10) need for vindication or an apology from the other; (11) overemphasis on the "principle" involved; and (12) righteous indignation, to name just a few.[33]

The Coase Theorem holds that if transaction costs are zero, the parties will always recognize the advantages of reaching an agreement.[34] Each party will be led by the "invisible hand" to the point that would be achieved by the ideal merger between the parties.[35] This solution will be reached regardless of how the law assigns property rights because there are no barriers hindering negotiations, and both parties have the same incentive to choose the most efficient result.[36]

Since transaction costs include all impediments to bargaining, there can never be a situation in which transaction costs are actually zero; just getting the parties together to talk involves transaction costs.[37] The Coase Theorem

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[29] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 85–95 (4th ed. 2004).

[30] *Id.* at 89.

[31] *Id.* at 88.

[32] *Id.* at 91–94.

[33] POSNER, *supra* note 1, at 575–77.

[34] R. H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

[35] COOTER & ULEN, *supra* note 29, at 87.

[36] *Id.* at 89.

[37] Coase, *supra* note 34, at 7–8.

does not require transaction costs to be absolutely zero for the parties to reach an agreement; it just requires that transaction costs be less than what is at stake.[38] Transaction costs need to be low enough for the parties to recognize a mutual gain from cooperation: the lower the transaction costs, the more likely this is to occur.[39]

Whether mediation is able to induce settlement depends largely on its ability to mitigate these transaction costs. The mediation process, through its use of a neutral third party mediator, is particularly adept at doing this. The mediator brings the parties together, establishes a constructive ambience for negotiation, collects confidential information from each side, and judiciously communicates selected portions of that confidential information.[40] The mediator always allows the parties to work out their own solutions while helping them clarify their values, deflate unreasonable claims, loosen commitments, seek joint gains, keep negotiations going, and articulate the rationales for agreement.[41]

A case will settle in mediation only if both parties perceive that, all things considered, an agreement would increase their welfare. The Coase Theorem predicts that this will happen regardless of the legal assignment of property rights when transaction costs are low, but by specifying when an assignment of property rights is not important, the Coase Theorem implies when an assignment of property rights is important—when transaction costs are high.[42] The very fact that a case is in litigation indicates that transaction costs are already high, and the mediation process adds its own transaction costs to the mix. So, the corollary to the Coase Theorem holds that when transaction costs are high enough to prevent private bargaining, the efficient use of resources will depend on how property rights are assigned.[43]

Litigation can be viewed as the cost of defining how property rights are assigned. Once the assignment of property rights have been defined, the parties may then be able to negotiate to their mutual advantage.[44] The property rights that need to be defined are identified when the parties file motions and responses to motions. The contested motions represent competing claims to specific property rights. By ruling on the pending

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[38] *Id.*

[39] *Id.*

[40] POSNER, *supra* note 1, at 567.

[41] *Id.*

[42] COOTER & ULEN, *supra* note 29, at 89.

[43] *Id.*

[44] Alex Robson & Stergios Skaperdas, *Costly Enforcement of Property Rights and the Coase Theorem*, 36 ECON. THEORY 109, 110 (2008).

motions before sending cases to mediation, the court, in effect, makes an assignment of these property rights, and once these property rights have been assigned, the parties will be able to explore whether there are still gains to be achieved through cooperation. While this is not a guarantee of settlement, it is an indication that the parties now have something to talk about.

## V. HYPOTHESIS

Cases in which the court rules on pending motions before mediation are more likely to reach a mediated settlement than those cases in which the court does not rule on pending motions.

### A. *Methodology*

Because the literature review of the mediation process shows that there are many barriers to reaching settlement in mediation, an unobtrusive research method was chosen in order to avoid the danger that the research itself would add to transaction costs. The data was collected by searching archival case file records.

*Archival Research and Content Analysis*: The **units of analysis** in this project were court case files of public record.

*Sampling Frame*: The **units of observation** were cases that were mediated through the court-connected program of the Civil Division of the Fulton County, Georgia, Superior Court from January 1, 2005 through December 31, 2008. The Civil Division of the Superior Court is the trial court of general jurisdiction, which hears cases both in equity and at law without regard to the amount in controversy in all non-criminal and non-domestic relations cases.

*Independent Variable*: The independent variable was the "pending motions" in the case. The level of measurement of the independent variable was nominal: cases either had pending motions or they did not. There were two attributes of cases with pending motions: cases in which the judge did not rule on any of the motions and cases in which the judge ruled on some, but not all of the motions. There were also two attributes of cases with no pending motions: cases in which no motions were filed and cases in which the judge ruled on all of the motions.

*Dependent Variable*: The dependent variable was "settlement in mediation." The level of measurement of the dependent variable was nominal: cases either settled or they did not settle. Partial settlements were treated as no settlements.

*Operational Definitions*: For the purpose of this research, a "motion" was defined as any request for some form of relief other than the original pleadings. Motions that pertained to issues of representation rather than to issues of the case, such as attorneys' motions for leave of absence, motions to withdraw as counsel, etc., were excluded.

The operational definition of a "pending" motion was any motion filed before the mediation took place and was contested by the opposing party that the court did not rule on the motion prior to mediation. Unopposed motions, motions withdrawn before mediation, and motions in which the parties consented to some form of relief, were excluded.

The operational definition of a "settlement in mediation" included cases in which the parties, within 120 days of the last mediation session, signed a written settlement agreement, announced to the court that a settlement had been reached, agreed to the entry of a consent order, or voluntarily dismissed their respective claims. This 120-day time frame was intended to capture most of the settlements attributable to the mediation process and only applied if there were no other court actions taken during that period.

*Measures and Coding*: The coders were third-year law students trained by the Principal Investigator using the Codebook and Coder Training Materials. Coder reliability was checked on three levels. First, the coders were given lists of case numbers to research that had some case numbers in common; the principal investigator compared the coding on the common case numbers for consistency. Second, if the coding was inconsistent on any file, the principal investigator coded that case and compared results with all coder results for the same case. The coders discussed their coding decisions with the goal of reaching consensus on proper coding. The principal investigator made the ultimate decision as to proper coding. Lastly, the principal investigator coded a random sample of the case numbers and compared the results with the coder results. Any discrepancies were resolved as stated above.

*Procedures*: Every document in every case file was examined to see whether it met the operational definition of a "motion." Each motion was then analyzed to see whether it met the operational definition of a "pending" motion.

## B. *Results*

**TABLE 1: Summary of Research Data**

| | No Pending Motions | | Pending Motions | | Total |
|---|---|---|---|---|---|
| | No Motions Filed | All Motions Ruled On | Some Motions Ruled On | No Motions Ruled On | Total |
| No Settlement | 155 | 12 | 29 | 44 | 240 |
| Settlement | 456 | 50 | 5 | 12 | 523 |
| Total | 611 | 62 | 34 | 56 | 763 |

**TABLE 2: Summary of Settlement Rates**

(1) All cases mediated: 69%
(2) All cases in which motions were filed before mediation: 44%
(3) Cases with no pending motions at the time of mediation: 75%
  a. No motions filed: 75%
  b. All motions ruled on: 81%
(4) Cases with pending motions at the time of mediation: 19%
  a. Some motions ruled on: 15%
  b. No motions ruled on: 21%

There were 523 settlements in 763 total cases, for an overall settlement rate of 69%. If there were no pending motions at the time of mediation, the settlement rate was 75%, but if pending motions were present, the settlement rate was only 19%. Motions were filed before mediation in 152 cases, and the overall settlement rate for these cases was 44%. If the court ruled on all of the motions before mediation, the settlement rate then jumped to 81%. If the court did not rule on any of the motions, the settlement rate dropped to 21%, and if the court ruled on some but not all of the motions, the settlement rate dropped again to 15%.

While these data appear to support the hypothesis, there is the possibility that the results just happen to coincide with the hypothesis as a random occurrence. In order to prove the hypothesis, the data must be analyzed, and the null hypothesis rejected.

## C. *Data Analysis*[45]

The hypothesis predicts that if the courts rule on pending motions before mediation, settlement rates will be higher than if they do not rule on pending motions. A necessary condition for this to be true is an inverse relationship between pending motions and settlement in mediation. This relationship can be observed by putting the research data in a chi-square contingency table, as follows:

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[45] A binary logistic regression was performed using the PASW 18 statistical software (formerly SPSS), in order to explore the relationship between pending motions and settlements. This procedure was chosen to accommodate the dichotomous dependent variable for settlements (yes = 1, no = 0). The independent variables in the regression equation are also dichotomous (yes = 1, no = 0): (1) no motions filed; (2) all motions ruled; (3) some motions ruled; and (4) no motions ruled. Due to the dichotomous nature of the independent variables, one variable was excluded from the analysis to serve as the condition against which the others were compared. For the purposes of this analysis, the impact of (2) all motions ruled, (3) some motions ruled, and (4) no motions ruled will be compared against cases in which (1) no motions were filed.

The results of the analysis reveals that, compared to cases in which no motions were filed, cases in which some motions were ruled on were less likely to be settled ($b$ = -.284, odds ratio = .059, $p$<.001), and cases in which no motions were ruled on were less likely to be settled ($b$ = -2.38, odds ratio = .093, $p$<.001). Cases in which all motions were ruled on were not statistically more or less likely to be settled than those in which no motions were filed. Cases in which some motions were ruled on are almost seventeen times less likely to be settled (1/odds ratio = 1/.059 = 16.95) than cases in which no motions were filed, and cases in which no motions were ruled on are almost eleven times less likely to be settled (1/odds ratio = 1/.093 = 10.75).

**Logistic Regression Results**

| ***Independent Variables*** | **B** | **SE B** |
|---|---|---|
| All Motions Ruled | 0.35 | 0.33 |
| Some Motions Ruled | -2.84 | 0.49*** |
| No Motions Ruled | -2.38 | 0.34*** |
| Constant | 1.08 | 0.09*** |

*Dependent Variable*: Settlement (1 = yes, 0 = no)

*$p<.05$, **$p\leq.01$, ***$p\leq.001$

The logistic regression supports the hypothesis and effectively rejects the null hypothesis at the $p<.001$ level.

TABLE 3

| | No Pending Motions | Pending Motions | Total |
|---|---|---|---|
| No Settlement | 167 | 73 | 240 |
| Settlement | 506 | 17 | 523 |
| Total | 673 | 90 | 763 |

An inverse relationship produces more settlements than no-settlements when there are no pending motions and more no-settlements than settlements when there are pending motions. Table 3 shows that settlements outnumbered no-settlements 506 to 167 when there were no pending motions and that no-settlements outnumbered settlements 73 to 17 when there were pending motions. While there were far more cases with no pending motions than cases with pending motions in the testing sample, each category strongly indicates an inverse relationship between pending motions and settlement in mediation.[46]

A comparison of settlement rates gives a more precise measure of the association. A total of 763 cases completed mediation with 523 cases reaching settlement, the baseline settlement rate for all cases mediated is 69%. The hypothesis predicts that the settlement rate for cases with no pending motions will not only have a settlement rate higher than those containing pending motions, but also the baseline. Cases with pending motions should have a settlement rate lower than cases with no pending motions and the baseline settlement rate.

Placing the research data in the settlement rate tables shows the following:

[46] The degree of association between two binary variables can be measured statistically by calculating the phi coefficient. In this case:

$\varphi$= [(a) (d)-(b) (c)] / $\sqrt{}$ [(e) (f) (g) (h)], where a=167, b=73, c=506, d=17, e=240, f=523, g=673, and h=90

$\varphi$= [(167) (17)-(73) (506) / $\sqrt{}$ (240) (523) (673) (90)

$\varphi$= −34,099 / 87,193.73

$\varphi$= −.391, indicating a medium (−.30) to strong (−.50) inverse relationship between pending motions and settlement.

TABLE 4

**Cases with No Pending Motions**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 506 |
| Number of Cases Mediated | n | n = 673 |
| Settlement Rate | % | s/n = 75% |

**Cases with Pending Motions**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 17 |
| Number of Cases Mediated | n | n = 90 |
| Settlement Rate | % | s/n = 19% |

As predicted by the hypothesis, cases in which there were no pending motions had a settlement rate greater than the baseline: 75% compared to 69%. Similarly, cases in which there were pending motions had a settlement rate much lower than the baseline: 19% compared to 69%. Comparing the two groups directly shows a 75% settlement rate for cases with no pending motions as opposed to a 19% settlement rate for cases with pending motions.

Cases with no pending motions were almost four times more likely to settle in mediation than cases with pending motions. There are two situations in which a case has no pending motions: (1) the court ruled on all the motions, and (2) no motions were filed. The hypothesis predicts that cases in which the court rules on pending motions are more likely to settle in mediation than cases in which the court does not. The hypothesis specifically refers to cases in which motions are filed before mediation and the court makes a decision on whether to rule on those motions before sending the case to mediation.

When the data are placed in a bi-variate cross tabulation table, it is clear that a majority of the cases in this research had no pending motions because no motions were ever filed.

TABLE 5

| | **No Pending Motions** | | **Pending Motions** | | **Total** |
|---|---|---|---|---|---|
| | No Motions Filed | All Motions Ruled On | Some Motions Ruled On | No Motions Ruled On | Total |
| No Settlement | 155 | 12 | 29 | 44 | 240 |
| Settlement | 456 | 50 | 5 | 12 | 523 |
| Total | 611 | 62 | 34 | 56 | 763 |

There were 611 cases in which no motions were filed before mediation. The settlement rate for these cases should be higher than the baseline of 69% because none of the cases with pending motions fall within this category:

**TABLE 6**

**Cases with No Motions Filed**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 456 |
| Number of Cases Mediated | n | n = 611 |
| Settlement Rate | % | s/n = 75% |

This leaves 152 cases in which motions were filed before mediation. These cases should have a lower settlement rate than the 69% baseline because all of the cases with pending motions fall within this category:

**TABLE 7**

**Cases with Motions Filed**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 67 |
| Number of Cases Mediated | n | n = 152 |
| Settlement Rate | % | s/n = 44% |

This also establishes the baseline settlement rate of 44% for all cases in which motions were filed before mediation.

The inverse relationship between pending motions and settlements must also apply to the cases in which motions were filed before mediation. This can once again be demonstrated with a chi-square association table:

**TABLE 8**

| | **No Pending Motions** | **Pending Motions** | **Total** |
|---|---|---|---|
| No Settlement | 12 | 73 | 85 |
| Settlement | 50 | 17 | 67 |
| Total | 62 | 90 | 152 |

Settlements outnumber no-settlements 50 to 12 when there are no pending motions, and no settlements outnumber settlements 73 to 17 when there are pending motions. This time, the hypothesis is supported by the research data by a ratio of greater than 4 to 1.

When motions are filed before mediation, a case can have no pending motions only if the court rules on all of the motions filed. By comparing the settlement rate of cases with no pending motions to cases with pending

motions, the effect of the court ruling on pending motions before mediation can be measured.

TABLE 9

**Cases with No Pending Motions**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 50 |
| Number of Cases Mediated | n | n = 62 |
| Settlement Rate | % | s/n = 81% |

**Cases with Pending Motions**

| | | |
|---|---|---|
| Number of Cases Settled in Mediation | s | s = 17 |
| Number of Cases Mediated | n | n = 90 |
| Settlement Rate | % | s/n = 19% |

As predicted by the hypothesis, cases in which there were no pending motions had a settlement rate greater than the baseline: 81% compared to 44%. Similarly, cases in which there were pending motions had a settlement rate much lower than the baseline: 19% compared to 44%. Once again, the null hypothesis appears to be rejected.

The attributes of cases with pending motions are of some interest. A case can have pending motions only if motions are filed and either the court rules on some of the motions or none of the motions. Placing this data in a chi-square association table shows:

TABLE 10

| | Some Motions Ruled On | No Motions Ruled On | Total |
|---|---|---|---|
| No Settlement | 29 | 44 | 73 |
| Settlement | 5 | 12 | 17 |
| Total | 34 | 56 | 90 |

The baseline settlement rate for cases with pending motions at the time of mediation is 19%. The settlement rate for cases in which some, but not all, motions were ruled on is 15%, and the settlement rate for cases in which no motions were ruled on is 21%. While it has no bearing on the hypothesis, it is interesting to note that settlement rates were better if the court ruled on none of the motions than if the court ruled on some but left others pending.

## VI. MATCHING RESEARCH TO THEORY

The research results were consistent with the Coase Theorem and its corollary. When the courts made an assignment of property rights by ruling on the pending motions, settlement rates soared upward. When the courts did not rule on all of the pending motions, settlement rates plummeted.

Interestingly, when the courts made an assignment of some property rights but not others, the settlement rates were lower than if the court had made no assignment at all. This result is consistent with mediation literature that suggests that court-connected mediation will induce settlement only to the extent that it clarifies risks and provides information about probable trial outcomes.[47] When the court rules on some, but not all motions, it sends mixed signals to the parties. Each party views the situation in the most favorable light. The party against whom the ruling was made will draw the conclusion that there must be merit in the remaining issues or else the court would have taken the opportunity to slam the lid on it. The party receiving the favorable ruling will draw the conclusion that the court is on board with the reasoning presented and is very likely to continue to do so. Both parties come away overly optimistic about the trial outcome and less willing to negotiate on the remaining contested issues. From the perspective of the Coase Theorem, transaction costs were aggravated, rather than mitigated.

## VII. IMPLICATIONS

The research results have practical implications for all judges, lawyers, and mediators associated with court-connected mediation programs. For judges, the implication is simple: rule on the pending motions before sending cases to mediation. Individual cases may present overriding circumstances that weigh against ruling on the motions before mediation, but all things being equal, mediation is more likely to induce settlement when the motions have been resolved. The logistic regression analysis of the data in this research shows that cases sent to mediation with pending motions were about eleven times less likely to settle in mediation than those in which there were no pending motions. Any initial time saved by not ruling on motions was lost when cases came back from mediation, not only to have those and subsequent motions heard, but also to have the entire case tried. Plus, the parties incurred the additional costs of mediation and suffered another delay in obtaining justice.

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[47] Shavell, *supra* note 23, at 24–27.

The implication for attorneys is also simple: when genuine issues exist, file appropriate motions before mediation. Attorneys may try to save their clients the cost of bringing and prosecuting motions by waiting until after mediation to file them. After all, if the baseline settlement rate for cases in which motions are filed is only 44%, while the settlement rate for cases in which no motions are filed is 75%, why not wait? The problem with this reasoning is the same that applies to the child who moves the hands on the clock so that it will be time for the cartoons to come on television. Settlement rates do not cause cases to settle; they just reflect the likelihood that a case will settle under certain conditions. By not filing motions when genuine issues exist, attorneys lose their best opportunity to maximize the likelihood of settlement in mediation. After all, courts cannot rule on motions that are not made.

By the same token, attorneys should not file motions before mediation when genuine issues do not exist. It is not uncommon for some attorneys to attempt to enhance their bargaining positions by filing numerous motions shortly before mediation, knowing fully well that there is not enough time for the court to rule on the motions before mediation. Perhaps this strategy actually works once in a blue moon, but most likely, it will only work to sabotage the mediation process. The difference in settlement rates between cases in which no motions are pending at the time of mediation, 75%, and cases in which motions are pending, 19%, strongly suggests that the filing of motions just before mediation has an extremely negative impact on mediation results. Rather than enhancing bargaining positions, unresolved motions result in viable settlement options going unexplored, money being left on the table, and valuable resources being wasted.

The implications for mediators are a bit more subtle. The first implication: find out whether any motion has been filed. The entire dynamics of a dispute changes when a party files a motion. The filing party now operates from a position of entitlement. If a response is filed, the opposing party also moves to a position of entitlement. From these respective positions, it will be difficult for the parties to see a mutually beneficial resolution because they will attempt to claim, rather than create value. Each party will be unwilling to consider a resolution that requires a perceived concession of valuable property rights, and each is likely to adopt a competitive, rather than a collaborative or compromising, negotiation strategy.

If the court rules on the motions, the entitlement issues are put to rest, and the mediator can focus on helping the parties identify where their best interests lie in light of the court's ruling. The mediator will need to be prepared to deal with certain psychological transaction costs on both sides.

For example, the prevailing party will want to negotiate from the perspective of having been justified, and the losing party will want to negotiate from the perspective of having been treated unfairly or perhaps from a need for vindication. The mediation process has proven to be very effective in dealing with these types of transaction costs, and it is certainly not surprising if mediation settlement rates jump when cases are in this position. Experienced mediators will help the parties reevaluate the risks involved in litigation, redefine case value, explore the new probabilities of trial outcomes, narrow the range of settlement negotiations, and move the parties to a less competitive negotiation style.

If the court does not rule on the motions, the entitlement issue is still on the table. The intensity of the dispute escalates and transaction costs increase as the parties dig in to defend their positions. The likelihood of reaching a mediated settlement drops precipitously before the mediation even begins. By filing motions, the parties identify in advance the major barriers to negotiation, giving the mediator an opportunity to devise a strategy to deal with them. Strategies for dealing with overly optimistic parties and for reality testing take high priority early in this type of mediation session, and resolution options that go beyond the four corners of the motions need to be explored to see whether there are mutually beneficial trade-offs to be made.

The second implication: find out whether either party plans to file motions in the event that the case does not settle in mediation. The difference in settlement rates between cases in which no motions were filed, 75%, and cases in which the court ruled on all pending motions, 81%, indicates that some parties in the research sample were probably holding some motions back until after mediation. Too often, motions are not filed before mediation, and parties mediate from a hidden agenda that creates invisible barriers to settlement. The bargaining strategy employed by the party with a hidden agenda may be more competitive than the situation appears to warrant and may frustrate negotiations. An informed mediator can help bring the issues to the surface.

Mediators need to know whether motions were filed, whether the court ruled on any of them, and whether motions are anticipated to be filed if the mediation fails to bring a resolution to the conflict. The strategy for mediation will be different for each situation. The likelihood of settlement increases when the mediator recognizes the types of transaction costs involved and employs appropriate strategies to mitigate them.

## VIII. CONCLUSION

When motions are filed before mediation, courts are presented with a golden opportunity to increase the overall effectiveness of court-connected mediation. By ruling on motions before sending cases to mediation, the court greatly increases the probability that the parties will be able to settle their dispute in mediation without trial. Not only does this reduce the court's busy calendar, but it saves time, money, and a good deal of anxiety for the parties. Thinking back to Roscoe Pound and why court-connected mediation was implemented in the first place, this is just too valuable an opportunity to pass up. Every settlement in mediation represents a victory in the court of public opinion.